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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 504

KINGSPORT PRESS, INC., *Petitioner*,

v.

FRANK W. McCULLOCH, BOYD LEEDOM, JOHN H. FANNING, GERALD A. BROWN, and HOWARD JENKINS, JR., Individually and as Chairman and Members of and Constituting the National Labor Relations Board,

and

LOCAL 175, ELECTROTYPERS UNION, INTERNATIONAL STEREOTYPERS AND ELECTROTYPERS UNION OF NORTH AMERICA, AFL-CIO, ET AL., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	4
STATEMENT OF THE CASE	4
I. Chronology	4
II. The Respects in Which Kingsport Claimed the Board Exceeded its Statutory Authority	10
A. Directing and Conducting the Elections Without Completion of the Record by the Receipt and Consideration of Briefs	10
B. Directing "Prehearing Elections"	13
C. Directing That Replaced Strikers Were Eligible to Vote	14
REASONS FOR GRANTING THE WRIT	17
CONCLUSION	24
APPENDIX A	1a
DECISIONS, ORDERS, OPINIONS AND JUDGMENTS BELOW	1a
1. Opinion of the Court of Appeals	1a
2. Judgment of the Court of Appeals	3a
3. Order of the District Court	4a
4. March 5, 1964 Decision and Direction of Elections of the Board	5a
5. April 27, 1964 Supplemental Decision and Order of the Board	13a

Page

APPENDIX B 20a

STATUTES INVOLVED 20a

1. National Labor Relations Act (29 U.S.C. § 141 et seq.) 20a

2. Administrative Procedure Act (5 U.S.C. § 1001 et seq.) 26a

APPENDIX C 31a

NATIONAL LABOR RELATIONS BOARD, RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE, SERIES 8, AS AMENDED 31a

1. Rules and Regulations 31a

2. Statements of Procedure 33a

AUTHORITIES CITED

CASES:

Atlas Life Ins. Co. v. Leedom, 284 F. 2d 231 (C.A. D.C.) 18, 21

Boire v. Greyhound Corp., 309 F. 2d 397 (C.A. 5) 17, 18

Boire v. Greyhound Corp., 376 U.S. 473, 84 S. Ct. 894 ..... 10, 18, 23

Boire v. Miami Herald Publishing Co., No. 20982 (C.A. 5) 23, 24

Deering Milliken, Inc. v. Johnston, 295 F. 2d 856 (C.A. 4) 11

Eastern Greyhound Lines v. Fusco, 323 F. 2d 477 (C.A. 6) 17, 20

Empresa Hondurena de Vapores, S.A. v. McLead, 300 F. 2d 222 (C.A. 2) 17, 19

General Cable Corp. v. Leedom, 278 F. 2d 237 (C.A. D.C.) 18, 21

Inland Empire District Council v. Millis, 325 U.S. 697 13

Leedom v. Kyne, 358 U.S. 184 ..... 10, 15, 17, 18, 19, 21, 22, 23

McCulloch v. Sociedad National de Marineros de Honduras, 372 U.S. 10 ..... 19, 23

Miami Herald v. Boire, 54 LRRM 2415 (S.D. Fla.) 14

Miami Newspaper Printing Pressmen's Union v. McCulloch, 322 F. 2d 993 (C.A. D.C.) 18

Page

N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333 6
Sangamon Valley Television Corp. v. U. S., 103 App. D.C. 113; 269 F. 2d 221 (C.A. D.C.) 12
Service v. Dulles, 354 U.S. 363 12
U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260 12
United Air Lines v. N.M.B., 330 F. 2d 853 (C.A. D.C.) 20, 23

ARTICLES AND REPORTS:

73 Harv. L. Rev. 217 21
H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 50 .. 13
105 Cong. Rec. 16629 (September 4, 1959) 13

STATUTES:

National Labor Relations Act (29 U.S.C. § 141 et seq.):

Section 6 ..... 4, 11, 12, 14, 16, 20a
Section 8(a)(5) 21, 20a
Section 8(b)(3) 21, 20a
Section 8(b)(4)(B) 21, 22, 21a
Section 8(b)(4)(C) 21, 21a
Section 8(b)(4)(D) 21, 21a
Section 8(b)(7) 21, 22, 21a
Section 9(b)(1) 15
Section 9(c)(1) 4, 11, 13, 14, 15, 22a
Section 9(c)(2) 15
Section 9(c)(3) 3, 4, 5, 7, 14, 15, 16, 23a
Section 9(c)(4) 15
Section 9(d) 17, 20, 21, 24a
Section 10 21
Section 10(e) 11, 17, 20, 21, 24a
Section 10(f) 11, 17, 20, 21, 25a
Section 14(c)(1) 16

Administrative Procedure Act (5 U.S.C. § 1001 et seq.):

Section 3 ..... 4, 11, 26a
Section 4 ..... 4, 27a
Section 10 ..... 4, 28a

Page

Judicial Code (28 U.S.C. § 1337):

Section 24(8) 8

National Labor Relations Board Rules and Regulations and Statements of Procedure:

Rules and Regulations:

Section 102.67(a) 5, 31a
Section 102.67(b) 5, 31a
Section 102.67(h) 5, 32a
Section 102.67(j) 11, 32a
Section 102.68 ..... 11, 32a

Statements of Procedure:

Section 101.21(b) 12, 33a

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Kingsport Press, Inc. (herein called petitioner or Kingsport) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on June 25, 1964.

OPINIONS BELOW

The decisions and orders of the National Labor Relations Board are reported at 146 NLRB Nos. 136, 137 (55 LRRM 1290, 56 LRRM 1006, 1007) and are printed in Appendix A hereto, *infra*, pp. 5a-19a.[1] The decision and order of the District Court is unreported but is printed in Appendix A hereto, *infra*, p. 4a. The opinion of the Court of Appeals is reported at 56 LRRM 2561, and is printed in Appendix A hereto, *infra*, pp. 1a-2a.

JURISDICTION

The judgment of the Court of Appeals (*infra*, p. 3a) was entered on June 25, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The National Labor Relations Board in advance of the date it had fixed for filing briefs, and indeed without awaiting briefs, directed that employee elections be held in a struck plant and that replaced strikers be permitted to vote in such elections. In a suit by the employer (petitioner here) to enjoin and set aside the order directing the elections, the District Court granted the Board's motion to dismiss "for the reason that the Court lacks jurisdiction over the subject matter of the action". It made no findings with respect to the employer's contentions that the Board not only had violated its own published regulations and "Statements of Procedure" but had exceeded its

[1] There was no printed record or appendix in the Court of Appeals below. The appeal was expedited and heard on the original record in the District Court which, in addition to the certified record in the Court of Appeals, has been filed with this Court.

authority under three specific sections of the National Labor Relations Act (herein called the Act).

In a joint motion on appeal, the parties stipulated that this case presented three "highly significant questions" (Certified record, pp. 11, 12):

"(a) Whether a district court has jurisdiction, at the suit of an employer, to enjoin a representation election directed by the National Labor Relations Board.

"(b) Whether the Board violated the Constitution, the Labor Act, or its own Rules and Regulations in directing a representation election prior to having received briefs from the employer and the unions.

"(c) Whether, under Section 9(c)(3) of the Act, the Board may regulate the voting eligibility of economic strikers on a case-by-case basis or whether it must promulgate formal rules under the procedures set out in the Administrative Procedure Act."

The Court of Appeals, in a *per curiam* opinion affirming the order of the district court dismissing the complaint for lack of jurisdiction, disclaimed reaching the merits, *i.e.*, questions (b) and (c), *supra*. Accordingly, the question presented to this Court is:

Does a district court, solely because the action has been brought by an employer, lack jurisdiction to enjoin a representation election directed by the Board irrespective of whether such action on the part of the Board was in excess of its delegated authority, was contrary to specific statutory provisions, and deprived such employer of legal or constitutional rights?

STATUTES INVOLVED

The statutory provisions principally involved are Sections 6, 9(c)(1) and 9(c)(3) of the National Labor Relations Act (29 U.S.C. § 156, 159(c)(1)(3)), and Sections 3, 4 and 10 of the Administrative Procedure Act (5 U.S.C. § 1002, 1003, 1009), which provisions are printed in Appendix B hereto, *infra*, pp. 20a, 22a-23a, 26a-30a.

STATEMENT OF THE CASE

I. CHRONOLOGY

Petitioner, a book manufacturer with its plant at Kingsport, Tennessee, had contracts with the printing trades unions affiliated with the AFL-CIO for about 30 years—the last such contracts expired, concurrently, on January 31, 1963. Disagreement over economic issues resulted in an impasse on new contract terms and, on March 11, 1963, the unions went on strike. As is an employer's right, Kingsport continued to operate its plant with non-strikers and new employees hired to replace strikers. The strike has continued and a majority of the strikers have not returned to work.

On January 27, 1964, almost eleven months after the commencement of the strike, four of the unions petitioned the National Labor Relations Board (herein called the Board) to conduct elections and certify their status. A hearing on these petitions was held on February 20, 21, 24 and 25 at Kingsport during which extensive testimony was taken on the numerous issues presented, including the contention that there were no *bona fide* questions of representation, the standing of the unions to petition for elections, the composition of the units, the proper placement of certain employees, and the eligibility of certain employees to vote.

On February 25, as the hearing was ending, the official reporter advised the hearing officer and the parties that it would take 10 days to complete the transcript of the hearing (estimated at 500 pages). Kingsport's counsel, accordingly, requested being given, in addition to the seven days provided as a matter of right (Board's Rules and Regulations, Sec. 102.67(a), Appendix C hereto, *infra*, p. 31a), another 14 days after the close of the hearing, or until March 17, to file a brief in view of the fact that he could not expect to receive the transcript until March 6. Although the hearing officer was authorized under the Board's Rules and Regulations (Sec. 102.67(a), *infra*, p. 31a) to accede to this request, he granted an extension of only six days (*i.e.* until March 9) for the filing of the briefs. Simultaneously, the hearing officer, without explanation, served an order on the parties transferring the cases to the Board in Washington, D. C., for decision.[2]

[The statutory framework for these proceedings included a 1959 amendment to Sec. 9(c)(3) of the Act which permitted economic strikers not entitled to rein-

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[2] Under the Board's Rules and Regulations, a decision in a representation case customarily is issued by the Regional Director with provision for "request for review" by the Board within 10 days (Sec. 102.67(b), *infra*, pp. 31a-32a). Pending review, the Director may "not conduct any election" (*ibid.*). In the instant matter, the seven days provided as a matter of right for the filing of briefs plus the 10 days allowed for review alone would have foreclosed any election directed by the Regional Director from being conducted within a year of the commencement of the strike. Customarily a longer period, of from six weeks to two months or more, elapses between the close of a hearing and the conduct of an election. However, provision is made for a regional director, as here, to transfer a case to the Board if it "raises questions which should be decided by the Board" (Rules and Regulations, Sec. 102.67(h), *infra*, p. 32a).

statement to vote under Board "regulations."[3] The applicability of such regulations, however, is limited by this same amendment to elections "conducted within 12 months after the commencement of the strike". Under the most liberal regulations possible—*i.e.*, ones permitting replaced strikers to vote on the 365th day of the strike—it would have been greatly to the advantage of the striking unions to have filed petitions early enough to have enabled the Board under its normal procedures to have conducted the elections within a year of the beginning of the strike. Obviously the belated filing of the petitions made it difficult to meet this deadline. At the hearing, union counsel offered no testimony respecting the voting eligibility of replaced strikers, requested no regulations on the subject, and made no attempt to expedite the hearing by ordering daily transcript copy—which of course would have made additional briefing time unnecessary. In any event, if union counsel had any intention of obtaining an election within the 12 month period this possibility was foreclosed by the ruling fixing the close of business March 9 as the time briefs were due, for the twelve month period expired at the end of the following day, March 10. No exception was taken by the unions to this ruling on briefs, nor was any appeal made to the Board.]

On February 27, Kingsport's counsel moved the Board to enlarge the time for the filing of briefs to March 17, as requested before the hearing officer. He heard nothing further until the morning of March 5,

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[3] Economic strikers who have been permanently replaced are not entitled to reinstatement, *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, and as a result of a 1947 amendment the Board until 1959 could not allow them to vote.

when he received a telephone call from the executive secretary of the Board in Washington and was told that the Board had already made a decision directing the holding of elections no later than March 10, 1964—the last day of the year in which the strike began. Counsel pointed out that briefs were not due until the close of business the following Monday (March 9); that he had just received the final volumes of the transcript that morning; and that he was at a loss to understand how the Board could decide the case without considering transcript or briefs. He was informed that, pursuant to instructions from Washington, the transcript had been flown from Atlanta, where the official reporter had her office, to Washington two days before[4] and that the matter was out of the executive secretary's hands. It was not until the morning of March 6, when a Board agent served the decision and direction of elections on counsel at 5:15 a.m., that Kingsport saw the text.

In its decision (Appendix A hereto, *infra*, pp. 5a-13a), the Board admitted that it was directing elections in advance of receiving Kingsport's brief, but justified its extraordinary action on the ground that unless the elections sought were held prior to March 11 strikers who had been replaced would, under Section 9(c)(3) of the Act, be rendered ineligible to vote. The Board, without affording Kingsport opportunity fully to advance and argue its position, brushed aside some of Kingsport's objections to the proceedings and to certain rulings of the hearing officer excluding proffered evidence, put off for post-

[4] Actually the last two volumes of transcript (consisting of 204 pages) were not delivered to the Board in Washington on March 3, but to the Atlanta regional office at the close of the day.

election decision other issues raised by Kingsport, and directed elections to be held on the petitions of the four unions "no later than March 10". This did not leave time even for the customary and regular requirement of the Board that an election not be held unless notices to employees were posted in the plant for three full working days. The notices for posting were not furnished until Saturday, March 7, and with the elections commencing early Tuesday morning, March 10, this left only one full working day for notice.

The Board, stating that it would treat briefs as motions for reconsideration, granted Kingsport's request for an extension of time for filing briefs to March 17 and ordered the Regional Director to impound the ballots pending receipt and consideration of briefs. The foregoing extraordinary, in fact unique, procedure was adopted by the Board without any ostensible request to do so by the unions. The Board, in its decision (*infra*, p. 11a), admitted that the procedure adopted was a "departure from that normally followed". To petitioner's knowledge, it had never been adopted prior to the instant cases.

On Friday, March 6, the same day that Kingsport's counsel was served with a copy of the Board's direction of elections, Kingsport promptly moved the Board to reconsider its action. No response having been received, Kingsport on Monday, March 9, proceeding under Section 24(8) of the Judicial Code (28 U.S.C. § 1337), filed a complaint in the District Court for the District of Columbia against the members of the Board and moved for an order restraining the elections pending hearing. The restraining order was denied, Board counsel representing that Kingsport would not be irreparably in-

jured by the holding of the elections as the Board had ordered the ballots impounded pending receipt of briefs and further decision. Thereafter, the same day, Kingsport received telegraphic advice that decision on its motion for reconsideration was being postponed by the Board until receipt of briefs.

Briefs were filed with the Board on or before March 17. On April 27—more than five weeks later—the Board issued a Supplemental Decision and Order (Appendix A hereto, *infra*, pp. 13a-19a) overruling Kingsport's objections to the procedures adopted by the Board, reaffirming the Board's original decision, and directing the opening and counting of the ballots.

Kingsport promptly moved in the District Court for hearing on its request for a preliminary injunction. On May 5, after argument, the District Court denied the injunction and granted the Board's motion to dismiss stating only that it was "for the reason that the Court lacks jurisdiction over the subject matter of the action".

Kingsport promptly appealed and moved the Court of Appeals for the District of Columbia Circuit to enjoin the counting of the ballots pending the appeal and to expedite the appeal. On May 15, an injunction pending appeal was denied but an expedited appeal on the original record was ordered. Argument was heard on June 4, and on June 25 the Court of Appeals, in a *per curiam* decision in which it did "not reach the merits" (Appendix A hereto, *infra*, p. 2a, fn. 1), "affirmed" the District Court's dismissal of Kingsport's complaint "for the reason that the court lacks jurisdiction over the subject matter of the action" (*infra*, p. 2a).

II. THE RESPECTS IN WHICH KINGSPORT CLAIMED THE BOARD EXCEEDED ITS STATUTORY AUTHORITY

Recognizing that "The *Kyne* exception is a narrow one, not to be extended to permit plenary review of Board orders in certification proceedings whenever . . . an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law",[5] petitioner's cause of action in the District Court was not based in any respect upon any "factual issue" developed at the hearing or upon those portions of the Board's decision rejecting petitioner's views on the appropriateness of certain units, excluding its proffered testimony on the lack of *bona fide* questions of representation, and other findings adverse to it on matters raised at the hearing. What petitioner complained of were the breaches by the Board of its own regulations and its departures in three respects from statutory requirements—the resolution of which issues turns entirely on questions of due process and statutory construction.

Summarized briefly, the points which petitioner raised in the courts below and on which they declined to pass were that the Board by unlawfully directing the elections exceeded its statutory authority in the following respects:

A. Directing and Conducting the Elections Without Completion of the Record by the Receipt and Consideration of Briefs

As it conceded in its March 5 decision, the Board ordered elections without considering, or even awaiting, the receipt of briefs which were not properly due until March 9, four days later. In doing so, the Board not only ignored its own regulations but acted contrary to limitations placed on its authority by the Act.

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[5] *Boire* v. *Greyhound Corporation*, 84 S. Ct. 894 at 899. The "*Kyne* exception" refers to *Leedom* v. *Kyne*, 358 U.S. 184.

Section 9(c)(1) of the Act (*infra*, pp. 22a-23a) specifies that the Board "shall provide for an appropriate hearing" in representation cases and "upon the record of such hearing" determine the issues and direct an election if it finds that a question of representation exists. Section 6 of the Act (*infra*, p. 20a) specifies that the Board "shall have authority . . . to make, amend, and rescind, *in the manner prescribed by the Administrative Procedure Act*, such rules and regulations as may be necessary to carry out the provisions of this Act" (italics added). The Administrative Procedure Act (herein called the APA), among other things, provides that agencies "shall . . . currently publish in the Federal Register" the "requirements of all formal or informal procedures" and that "No persons shall in any manner be required to resort to organization or procedure not so published" (Sec. 3 (5 U.S.C. § 1002), *infra*, pp. 26a-27a).[6]

Long before this controversy, the Board, pursuant to the provisions of Section 6 of the Act and in accordance with Section 3 of the APA, had published its Rules and Regulations and Statements of Procedure in the *Federal Register*. These Rules and Regulations specify, *inter alia*, that "upon transfer of the case to the Board [as was done here], the Board shall . . . upon the record . . . decide the issues" and "direct a secret ballot of the employees" (Sec. 102.67(j), *infra*, p. 32a), and that the "*record* . . . shall consist of . . . any *briefs*" (Sec. 102.68, *infra*, p. 32a; italics added). The Sta-

[6] For a discussion of a court's jurisdiction to enjoin the Board's violation of the provisions of the APA, notwithstanding the review procedures of Sections 10(e) and (f) of the Act, see *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (C.A. 4).

ments of Procedure (Sec. 101.21(b), *infra*, p. 33a) state *inter alia*, that—

> . . . *All parties may file briefs* with the regional director or, if the case is transferred to the Board at the close of the hearing, with the Board, within 7 days after the close of the hearing. If the case is transferred to the Board after the close of the hearing, briefs may be filed with the Board within the time prescribed by the regional director. The parties may also request to be heard orally. Because of the nature of the proceedings, however, permission to argue orally is rarely granted. *After review of the entire case*, the regional director or *the Board issues a decision*, either dismissing the petition or directing that an election be held . . . (italics added).

By refusing to permit the record to be completed by the receipt of timely briefs before deciding the "issues" and directing the "secret ballot of the employees" the Board, for the purposes of this case, amended or rescinded its Rules and Regulations and Statements of Procedure *ad hoc*. This was clearly contrary to the prohibition in Section 6 of the Act against modifying or rescinding regulations except in the manner prescribed by the APA.[7]

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[7] Even where the nature of the regulations is discretionary, it is fundamental that the agency, as well as the citizen, is bound by the agency's rules and regulations *U.S. ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 265; *Service* v. *Dulles*, 354 U.S. 363, 371, 372-3; *Sangamon Valley Television Corp.* v. *U.S.*, 103 App. D.C. 113; 269 F. 2d 221, 224 (C.A. D.C.). This deprivation of petitioner's constitutional rights was not cured by the Board's impounding of ballots and subsequent review of the briefs, as the supplemental decision permitted to stand the elections directed on a date when the Board had no authority to issue such an order.

B. Directing "Prehearing Elections"

Kingsport also argued below that in making its findings and directing the elections prior to the timely receipt of briefs, the Board disregarded the statutory prohibition against the conduct of prehearing elections.

After this Court's decision in *Inland Empire District Council* v. *Millis*, 325 U.S. 697, the Board in 1945 adopted a prehearing election procedure whereby elections were held first with provision for hearing later on issues such as those raised before the Board here in the representation proceeding—*e.g.*, whether a question concerning representation existed, the appropriate unit, eligibility of voters, and other similar matters. This procedure received widespread criticism and, in 1947, Congress amended Section 9(c)(1) of the Act (*infra*, p. 23a), *inter alia*, to require that the Board decide "upon the record of [an appropriate] hearing" that "a question of representation exists" *before* directing an election (*H. Conf. Rep. No. 510 on H.R. 3020*, 80th Cong., 1st Sess. p. 50; *Legisl. Hist. of the Labor-Management Relations Act, 1947*, vol. 1, p. 554). The Board conceded below that this amendment prohibited it from thenceforth "holding hearings *after* directing and conducting an election". Efforts in 1959 to repeal this restriction failed (see 105 *Cong. Rec.* 16629 (September 4, 1959); *Legisl. Hist. of the Labor-Management Reporting and Disclosure Act of 1959*, vol. II, p. 1714). As Congressman Barden, Chairman of the House Labor Committee, stated in reporting on the conference agreement to the House in 1959 (*ibid.*):

> . . . The right to a formal hearing before the election can be directed is preserved without limitation or qualification.

Here the Board did not await the completion of the "record" as defined by its own regulations of the "appropriate hearing" by the timely filing of briefs (Sec. 9(c)(1) of the Act, *infra*, p. 23a). Instead, before Kingsport had been afforded opportunity to argue fully the issues presented, including whether or not there should be any elections, the Board directed and conducted such elections, stating that the briefs when received thereafter would be treated as motions for reconsideration. Petitioner submits that in so doing, the Board reverted to the prehearing election procedures banned by the statutory amendments of 1947.

C. Directing That Replaced Strikers Were Eligible to Vote

Another departure from statutory requirements on the part of the Board to which the attention of the courts below was drawn, appears in the direction that strikers, as well as "their replacements," were eligible to vote in the elections (*infra*, p. 12a). With respect to this phase of the decision the Board again exceeded plain limitations on its statutory authority.

Replaced strikers do not have an unqualified right to vote in an election conducted within a year of the strike. Section 9(c)(3) of the Act, as amended (*infra*, p. 23a), provides only that such strikers "shall be eligible to vote *under such regulations* as the Board shall find are consistent with the purposes and provisions of this Act" (italics added). Section 6 of the Act (*infra*, p. 20a) requires the promulgation of "regulations" "in the manner prescribed by the Administrative Procedure Act". The Board has never promulgated such "regulations" and consequently had no statutory authority in the instant cases to declare replaced strikers eligible to vote. See *Miami Herald* v. *Boire*, 54 LRRM 2415 (S.D. Fla.).

Exactly the same type of question was involved in *Leedom* v. *Kyne*, 358 U.S. 184. That case involved the provision in Section 9(b)(1) of the Act forbidding the inclusion of professional and non-professional employees in the same bargaining unit "unless a majority of such professional employees vote for inclusion in such unit". There this Court held that the Board exceeded its authority in declaring such a unit appropriate "without polling the professional employees" regarding their desires (*ibid.*, at p. 187). Here the Board violated Section 9(c)(3) by holding that replaced strikers could vote without having issued the requisite "regulations".

The Board is manifestly in error in asserting that it is empowered under Section 9(c)(3) to deal with the problem of the voting eligibility of replaced strikers on a case-to-case basis. This thesis is premised on the assumption that in amending the Act, Congress made no distinction between rule making and adjudication and consequently the term "regulations" in Section 9(c)(3) can also be read as "rules of decision". But as far back as the 1947 amendments to Section 9 of the Act, Congress showed its awareness of the differences between these two types of administrative agency proceedings. In amending Section 9(c)(1) to give employers and individual workers as well as labor organizations a right to file election petitions, it provided, in Section 9(c)(2), that—

> (2) In determining whether or not a question of representation . . . exists, the same *regulations* and *rules of decision* shall apply irrespective of the identity of the person filing the petition or the kind of relief sought . . ." (italics supplied).

Similarly in Section 9(c)(4), authorizing consent elections, mention is also made of both "regulations"

and "rules of decision". The absence in Section 9 (c)(3) of any reference to "rules of decision" constitutes a marked contrast to the subsections immediately preceding and following. Hence, under familiar canons of statutory construction, it must be inferred that the omission of the term "rules of decision" was deliberate.

Moreover, when Congress desired to empower the Board to proceed by "rule of decision" it made this clear. Thus, in the same amendments to the Act (1959) in which it enacted the provision regarding replaced strikers voting, Congress provided authority in Section 14(c)(1) for the Board to decline jurisdiction in certain situations. To remove the exercise of that authority from the requirements of Section 6 of the Act, Congress expressly stated that the "Board, in its discretion, may, by *rule of decision* or published rules adopted pursuant to the Administrative Procedure Act" exercise this prerogative (italics added). The absence of the alternatives in Section 9(c)(3) compels the conclusion that Congress intended the Section 9(c)(3) "regulations" to be promulgated in accordance with Section 6 of the Act.

The eligibility of replaced strikers to vote in the elections was of prime significance in this matter; the desire to qualify them by conducting the elections within the year was the sole reason for the Board's disregard of other statutory provisions. The Board's *ad hoc* ruling in favor of their eligibility, contrary to the statutory requirement that it be by "regulations", heavily tipped the scales in the elections in favor of the unions.

REASONS FOR GRANTING THE WRIT

1. The holding of the Court of Appeals below clearly is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Boire* v. *Greyhound Corp.*, 309 F. 2d 397, and also seemingly is in conflict with the decisions of the Second and Sixth Circuits in *Empresa Hondurena de Vapores, S.A.* v. *McLeod*, 300 F. 2d 222 (C.A. 2), and *Eastern Greyhound Lines* v. *Fusco*, 323 F. 2d 477 (C.A. 6).

In the courts below petitioner contended that the Board's actions disregarded statutory limitations on the Board's authority and violated specific provisions of the Act,[8] and urged that the direction of the elections be set aside under the exception carved out in *Leedom* v. *Kyne*, 358 U.S. 184. In that case, this Court affirmed an injunction issued on complaint of a union against an election order of the Board, holding that the courts have jurisdiction "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act" (*ibid.*, at p. 188). In this litigation Board counsel opposed relief on the grounds, *primarily*, that the *Kyne* exception was only applicable to suits brought by unions, not by employers, and, *secondarily*, that on the merits this was not a *Kyne* situation.

As the Court of Appeals below expressly stated that it did "not reach the merits" it is plain that the courts below predicated their conclusion that they lacked "jurisdiction over the subject matter of the action"

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[8] Kingsport did not seek review of any of the rulings or determinations of the Board traditionally made in representation proceedings. It conceded that such rulings are reviewable only through the provisions of Sections 10(e) and (f) and 9(d) of the Act (*infra*, pp. 24a-26a).

exclusively on the belief that even though the complaint raises issues of the nature presented in *Kyne*, courts nonetheless "lack jurisdiction" if the proceedings is instituted by an employer. Discriminatory as this doctrine appears to be, it is nevertheless a rule of long standing in the District of Columbia Circuit. See *General Cable Corp.* v. *Leedom*, 278 F. 2d 237, 239, (C.A. D.C.); *Atlas Life Ins. Co.* v. *Leedom*, 284 F. 2d 231, 232 (C.A. D.C.); *Miami Newspaper Printing Pressmen's Union* v. *McCulloch*, 322 F. 2d 993, 997 fn. 7 (C.A. D.C.).

However, in *Boire* v. *Greyhound Corp.*, 309 F. 2d 397, the Fifth Circuit expressed itself as in complete "agreement" with a lower court's opinion that "nothing in the *Leedom* [*Kyne*] case indicates the proposition" that "only the Union can invoke the equity jurisdiction of the District Court" (205 F. Supp., at p. 690), and affirmed an injunction issued on the employer's complaint against the representation proceedings there involved. It is thus clear that the Fifth Circuit squarely held in *Greyhound* that the courts do have jurisdiction on an employer's complaint to enjoin an election order of the Board. This directly conflicts with the holding of the Court of Appeals here.

On petition for certiorari to this Court, the Board sought reversal of the Fifth Circuit in the *Greyhound* case on the ground that district courts lack jurisdiction on complaint of an employer to enjoin a Board election order.[9] This Court, however, refused to re-

[9] The Board stated in its petition—as the sole "Question Presented"—"Whether a district court has jurisdiction, at the suit of an employer, to enjoin a representation election directed by the National Labor Relations Board," and repeatedly sought to distinguish *Leedom* v. *Kyne* by stressing that "*Kyne* was a suit brought by a union rather than an employer."

verse the challenged decision on this ground (84 S. Ct. 894), leaving undisturbed the Fifth Circuit's opinion that a district court does have this jurisdiction. What this Court did was to restate the principle that under *Leedom* v. *Kyne* the function of a district court is "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition of the Act" (*ibid.*, p. 898), without limiting the holding to suits by unions. It then set aside the decision of the Fifth Circuit on a secondary ground urged by the Board after certiorari had been granted, *viz.*, that the *Greyhound* case involved "essentially a factual issue"—*i.e.*, whether Greyhound was an employer of the employees involved—"unlike the question in *Kyne*, which depended solely upon construction of the statute" (*ibid.*, p. 899).[10]

Accordingly, the fact that this Court, although urged to do so by the Board, pointedly refrained from holding that a party to a representation proceeding who comes within the *Kyne* rule in other respects was barred from invoking the equity jurisdiction of a district court merely because he was an employer, indicates that the District of Columbia Circuit's rule is far too sweeping.

Also, a conflict between the Second Circuit and the decision of the court below is indicated by *Empresa Hondurena de Vapores, S. A.* v. *McLeod*, *supra*, p. 17, granting an injunction against representation proceedings of the Board on complaint of an employer. To be sure, this Court did reverse the Second Circuit in that case (*subnom.*, *McCulloch* v. *Sociedad National de Marineros de Honduras*, 372 U.S. 10), but solely be-

[10] Kingsport's complaint was predicated solely on the Board's disregard of statutory provisions; factual issues were in no respect involved.

cause the companion case, *Sociedad Nacional*, presented the "question in better perspective" (whether the Board had jurisdiction over foreign-flag ships employing alien seamen) and obviated the necessity for this Court "passing on the jurisdictional questions raised" in *Empresa* (*ibid.*, p. 16) which questions included, in addition to the one at bar, whether the Board members were indispensable parties. The reversal, under these circumstances, therefore cannot be regarded as a determination that the Second Circuit was wrong. Rather, it indicated merely that this Court preferred at that time to leave open the question as to the jurisdiction of district courts to grant relief in an employer suit against unauthorized action by the Board in an election case.

The holding below, moreover, cannot be reconciled with dictum of the Sixth Circuit in *Eastern Greyhound Lines* v. *Fusco*, *supra*, p. 17. Although the court in that case denied the injunction it did express the view that an "employer" is entitled to relief if it "can bring itself within the limited exceptions of *Leedom* v. *Kyne*" (323 F. 2d at p. 479).[11]

2. There is no reason in statutory language, legislative history, or logic, for holding that the courts have jurisdiction in these matters at the suit of a union but not at the suit of an employer. Employers have the same inadequate relief under Sections 9(d), 10(e) and 10(f) of the Act (*infra*, pp. 24a-26a) as unions in these situations. True an employer may run the risk of converting an economic strike into an unfair labor practice strike, with the potential liability of backpay

[11] See also the views of a majority of a different panel of the Court of Appeals below on a similar question in *United Air Lines* v. *N.M.B.*, 330 F. 2d 853, 854 (C.A. D.C.), presently before this Court on petitions for certiorari, Nos. 138, 139 and 269.

(here for some 1300 employees), by refusing to bargain with the union certified by the Board and test the Board's representation action in an unfair labor practice complaint proceeding. But a union has comparable rights. Thus, the union in the *Kyne* case could, with monetary impunity, have refused to bargain for the handful of employees improperly included by the Board in the bargaining unit, and awaited testing of the Board's action in the representation case through the same unfair labor practice procedures available in respect to employers (*cf.* Sec. 8(a)(5) of the Act with Sec. 8(b)(3), *infra*, p. 20a, and see Sec. 10).

Also an aggrieved union may aggressively challenge adverse action by the Board in a representation proceeding by engaging in secondary boycott or jurisdictional dispute activities under Sections 8(b)(4)(B) and 8(b)(4)(D) of the Act (*infra*, pp. 20a-21a), or by conducing recognitional picketing under Section 8(b)(4)(C) or 8(b)(7) of the Act (*infra*, pp. 20a-22a). Sections 8(b)(4)(B), 8(b)(4)(D) and 8(b)(7) provide immunity from the prohibitions of those sections for certified unions, and a violation of Section 8(b)(4)(C) depends upon certification of another union. By subjecting itself to unfair labor practice charges under these sections, and a cease and desist order, the union could obtain judicial review of the prior representation proceeding under Section 10(e) or (f) of the Act through the avenue of Section 9(d) (*infra*, pp. 24a-26a).[12]

[12] The District of Columbia Circuit in assuming that only employers could ultimately obtain statutory judicial review under Section 9(d) and Sections 10(e) and (f) overlooked the fact that, by engaging in similar illegal actions, parallel remedies were also available to unions. See *Atlas* v. *Leedom*, 284 F. 2d 231, 232, and *General Cable*, 278 F. 2d 237, 239, *supra*, p. 18. An interesting discussion of this aspect of the Act appears in 73 *Harv. L. Rev.*, pp. 217, 219-20.

These avenues of review, of course, depend upon the filing of a charge by an injured person and very likely that is what this Court meant when it pointed out in *Leedom* v. *Kyne* (at p. 190), that the professional employees there had no other means of review "within their control".[13] However, if the review procedures of the Act are beyond the control of a labor organization because they depend upon the filing of an unfair labor practice charge by some adversary the parallel procedures available to an employer are subject to the same defect. Thus, in the instant case the suggestion that Kingsport can ultimately obtain judicial review through the procedures of the Act presupposes that should the striking unions be certified and Kingsport then refused to bargain with them the unions would file charges with the Board. It is equally likely, however, that if recognition were withheld the unions, instead, would engage in secondary boycott activities and conduct recognitional picketing with complete immunity under Sections 8(b)(4)(B) and 8(b)(7) of the Act. It might well be to their interests not to file charges, with the expectation that such economic pressure would be more effective than resort to litigation while at the same time it would not provide the employer the means of possibly overturning the protection of their certified status.

3. The question presented by this case—the standing of an employer to sue in the district court—is one of first importance in the administration of the National Labor Relations Act and has become more acute in recent years as a result of the two decisions of this

[13] The action there was not instituted by individual professional employees but by the union.

Court, *viz., Greyhound* and *Sociedad, supra,* in which the question was specifically reserved.

In respect to the petition now pending before this Court in No. 139, *United Air-Lines* v. *N. M. B.,* which raises the same question under the Railway Labor Act, the Solicitor General in No. 369 (at p. 8) has conceded that the issue is one of "first importance" in the administration of that statute. Accordingly, the Solicitor General (Petition No. 369, p. 12) has recommended that review be granted in the *United Air Lines* case (No. 139). It is submitted that the considerations for granting the writ here are equally compelling. For, unless an employer has standing to obtain relief in the district courts, the Board may—as it did here—disregard clear statutory restrictions and its own rules and regulations at an employer's expense without any effective restraint. This disregard of statutory provisions and rules and regulations need not be limited to situations like those here but reasonably may be extended to cover any situation.

Furthermore, the importance of the question is demonstrated by the fact that the Board has consistently maintained in the courts that *Kyne* relief is available only to unions, not to employers. It is certain that the Board will continue to do this if the decision of the Court of Appeals below is permitted to stand. In fact, it is currently advancing this position to the Fifth Circuit, in *Boire* v. *Miami Herald Publishing Co.,* No. 20982, as its major ground for setting aside the district court's election injunction.[14] Incidentally,

[14] The Board's brief to the Fifth Circuit (at p. 14) states "We submit that on three grounds this suit is outside the narrow *Kyne* exception: (1) *Kyne* was a suit by a union . . . this is a suit by an employer . . .".

but not of controlling significance here because the courts below did not "reach the merits", the *Miami Herald* injunction was predicated solely on the fact that the Board had directed that the votes of replaced economic strikers be counted notwithstanding the absence of published regulations under the APA. This was only one of the three grounds advanced in the complaint for striking down the Board's decision in the instant matter.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Dated: September, 1964

APPENDIX A

DECISIONS, ORDERS, OPINIONS AND JUDGMENTS BELOW

1. Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18609

KINGSPORT PRESS, INC., APPELLANT,

v.

FRANK W. MCCULLOCH, et al., individually and as Chairman and Members of and constituting the National Labor Relations Board, et al., APPELLEES.

Appeal from the United States District Court for the District of Columbia

Decided June 25, 1964

* * * * *

Before DANAHER, BURGER and WRIGHT, *Circuit Judges.*

PER CURIAM: Prior to the expiration of certain collective bargaining agreements, five printing trades unions presented economic demands which the appellant deemed unacceptable. Although the contracts expired on January 1, 1963, the parties contined to negotiate until on March 11, 1963 a strike was called. Some eleven months later, four of the striking unions requested the Board to conduct representation elections pursuant to section 9(c)(1) of the Act. Consolidated hearings were concluded on February 25, 1964. The appellant requested an extension of time to file briefs, but the Board on March 5 issued its decision and direction of elections to be held on March, 10, 1964. At the same time the Board extended the time for the filing of briefs until March 17, stating that it would deem the briefs when filed as motions for reconsideration

and would impound the ballots pending consideration of the case.

The Board took the position that unless the elections could be held prior to March 11, 1964, by virtue of section 9(c)(3) of the National Labor Relations Act as amended, 61 STAT. 136, 73 STAT. 519, 29 U.S.C. § 151 *et seq.*, strikers who had been replaced would have been rendered ineligible to vote. Under that section economic strikers not entitled to reinstatement could participate only in an "election conducted within twelve months after the commencement of the strike." The Board had acted *sua sponte*, explaining:

> "[I]n order to implement to the extent possible the Congressional intent to enfranchise replaced strikers during the first 12 months of an economic strike, we have decided to direct an election to be held no later than March 10, 1964, without awaiting any briefs which parties may file. We believe that this procedure, although a departure from that normally followed, is warranted by the circumstances and will effectuate the purposes and policies of the Act."

The appellant in the District Court sought to restrain the elections. The Board's motion to dismiss was granted "for the reason that the court lacks jurisdiction over the subject matter of the action." Appellant then sought a stay in this court. Even as we denied the appellant's motion, we ordered expedited consideration of the appeal.

Now after full argument, we have given consideration to the briefs[1] and the claims earnestly advanced by counsel. We are satisfied that the order of the District Court must be

Affirmed.[2]

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[1] Appellant has moved that the court strike certain portions of the brief filed by the intervenors. Since we do not reach the merits, we deem it unnecessary to act on that motion.

[2] Compare Boire v. Greyhound Corp., 376 U.S. 473 (1964) with Leedom v. Kyne, 358 U.S. 184 (1958).

2. Judgment of the Court of Appeals

* * * * *

Appeal from the United States District Court for the District of Columbia.

Before: Danaher, Burger and Wright, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby affirmed.

Per Curiam.

Dated: June 25, 1964

3. Order of the District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 579-64

KINGSPORT PRESS, INC., *Plaintiff*

v.

FRANK W. MCCULLOCH, BOYD LEEDOM, JOHN H. FANNING, GERALD A. BROWN, and HOWARD JENKINS, JR., individually and as Chairman and Members of and constituting the National Labor Relations Board,
Defendants.

ORDER

This matter having come on to be heard on the motion of defendants to dismiss the complaint or, in the alternative, for summary judgment in their favor, and the Court having considered the memoranda in support thereof and in opposition thereto, and having heard argument of counsel, it is, this 5th day of May, 1964,

ORDERED that defendants' motion to dismiss be and the same is hereby granted for the reason that the Court lacks jurisdiction over the subject matter of the action.

/s/ WILLIAM B. JONES
William B. Jones
United States District Judge

4. March 5, 1964 Decision and Direction of Elections of the Board

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 10-RC-5804

KINGSPORT PRESS, INC., *Employer*

and

LOCAL 175, ELECTROTYPERS UNION, INTERNATIONAL STEREOTYPERS & ELECTROTYPERS UNION OF NORTH AMERICA, AFL-CIO, *Petitioner*

and

Case No. 10-RC-5805

KINGSPORT PRINTING PRESSMEN & ASSISTANTS' UNION NO. 336, INTERNATIONAL PRINTING PRESSMEN & ASSISTANTS' UNION OF NORTH AMERICA, AFL-CIO, *Petitioner*

and

Case No. 10-RC-5806

PROGRESSIVE LODGE NO. 1694 INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner*

and

Case No. 10-RC-5807

BINDERY WORKERS UNION, LOCAL NO. 82, INTERNATIONAL BROTHERHOOD OF BOOKBINDERS, AFL-CIO, *Petitioner*[1]

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[1] The several Petitioners are referred to herein as the Electrotypers, the Pressmen, the Machinists, and the Bindery Workers respectively. The Pressmen intervened in Cases Nos. 10-RC-5806 and 10-RC-5807 on the basis of representative showings of interest, i.e., in excess of 20 percent. For this reason, we shall treat the Pressmen as a cross-Petitioner in those two cases.

DECISION AND DIRECTION OF ELECTIONS

Upon separate petitions duly filed under Section 9(c) of the National Labor Relations Act, a consolidated hearing was held before Hutton S. Brandon, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with these cases to a three-member panel.

Upon the record of the hearing,[2] the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent certain employees of the Employer.

3. The Employer contends that no question of representation exists because it has for many years recognized and continues to recognize each of the four Petitioners as the bargaining representative of employees in the requested units. Further, as to the petitions filed by the Machinists and the Bindery Workers, the Employer contends that no question concerning representation exists because such Petitioners are currently certified by the Board as the representatives for the units respectively sought by them. We need not reach the latter contention, in view of the

[2] For the reasons stated below, we are issuing our Decision and Direction of Election prior to the expiration of the time for filing briefs. Our findings herein are therefore made in the light of the record facts and the positions of the parties as set forth at the hearing. In any briefs subsequently filed, should any issues be raised which would warrant a modification or reversal of any of the findings made herein, we shall treat such briefs as motions for reconsideration. The hearing officer granted an extension of time until March 9, 1964, for the filing of briefs. Subsequently, the Employer requested the Board to grant a further extension to the close of business on March 17, 1964. Such request is hereby granted.

intervention of the Pressmen in Case Nos. 10-RC-5806 and 10-RC-5807, on the basis of representative showings of interest, sufficient to constitute them as cross-Petitioners. For this reason alone, a question concerning representation exists in those two cases. As to the other two cases, the Employer's contention is without merit. It is well settled that the fact that a petitioning union is recognized by an employer does not preclude the existence of a question concerning representation.[3]

Accordingly, we find that in each case a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. *The appropriate units*
Case No. 10-RC-5804:

The Electrotypers seeks certification in a unit of employees currently represented by it, comprising all those in the Employer's Molded Plate or Electrotyping department, together with those engaged in making offset and and dyeril plates in the Photo-Chemical department. The Employer contends that the unit should encompass all employees in its Molded Plate, Composing Room, and Photo-Chemical departments, which together make up its Pre-Press Division, on the ground that these departments are integrated and that the unit of composing room employees currently represented by the International Typographical Union, herein called the ITU,[4] and the unit

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[3] See *Central Coat, Apron & Linen Service, Inc., etc.*, 126 NLRB 958; *General Box Company*, 82 NLRB 678.

[4] The ITU, although served with notice of the filing of the petition in Case No. 10-RC-5804, did not appear at the hearing. It is the certified representative of employees in the Employer's composing room. In view of our finding below that such employees are excluded from the appropriate unit in this case, its interests in the proceedings are not prejudiced.

historically represented by the Electrotypers are no longer appropriate.

The Electrotypers has represented the employees in the Molded Plate department of the Employer's printing establishment since 1937 and has negotiated contracts with the Employer covering such employees until the expiration of its most recent contract in 1963. Like the other labor organizations currently recognized by the Employer, the Electrotypers since March 11, 1963, has been engaged in an economic strike against the Employer in support of bargaining demands. During the term of the latest contract, the Employer introduced the lithographic and other new processes into its operations and in December 1962 the Employer recognized the Electrotypers as representatives of employees engaged in making offset and dyeril plates in the newly formed Photo-Chemical department.

As a result of changes brough about through the introduction of new printing processes, the Employer has added the Photo-Chemical department and effected a closer integration between the composing room and the Molded Plate departments. As part of its plan to integrate the constituent departments of the Pre-Press Division, the Employer has placed all three departments under a division supervisor and has interchanged employees in order that they may be trained in more than one of the skills utilized in the division and to minimize avoidable overtime during periods of peak production in the different printing processes. However, the record establishes that the Molded Plate department has separate immediate supervision and that, notwithstanding the interchange above indicated, employees in the Molded Plate department are primarily employed in skilled electrotyping duties and only secondarily assigned to other work in the division. Accordingly, on the basis of their separate bargaining history and the absence of any persuasive evidence that

they do not have a separate community of interests by virtue of their electrotyping and platemaking skills, we find that the following employees of the Employer at its Kingsport, Tennessee, plant, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All journeymen electrotypers and stereotypers, apprentices and helpers in the Molded Plate department, and all employees engaged in offset and dycril platemaking in the Photo-Chemical department, excluding all other employees, office clerical employees, professional employees, guards, watchmen, and supervisors as defined in the Act.[5]

Case No. 10-RC-5805:

We find that the following employees of the Employer at its Kingsport, Tennessee, plant, represented by the Pressmen since 1935, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All journeymen pressmen, apprentices, assistants and helpers in the flatbed, rotary, paper stock, paste vault and spot up roller molds sections, line up assistants, ink vault assistants, bundler offpress folder, vault machine operators and helpers, and all offset pressmen, excluding all other employees, office clerical employees, professional em-

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[5] In the event the Employer wishes to take a position against including in the unit the offset and dycril platemakers, it may raise such issue by challenging them at the election. As to the unit placement issues raised concerning plate repair men, the 4-color proof press operator, and the supervisory status of Hiram Hughes, Hobart Quillen, and Ivar Steadman, and as to all other unit placement issues raised in this consolidated proceeding, we shall not, for the reasons hereafter discussed, resolve them at this time but shall permit any such individuals to cast challenged ballots.

ployees, guards, watchmen, and supervisors as defined in the Act.[6]

Case No. 10-RC-5806:

We find, in accord with the parties' stipulation and the prior certification of the Board, that the following employees of the Employer at its Kingsport, Tennessee, plant, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All journeymen and apprentice maintenance mechanics, journeymen and apprentice machinists, knife grinders, laborers, helpers, and tool crib attendants, excluding all technical, professional, research and developmental and/or experimental employees, office and plant clerical employees, guards, watchmen, leadmen with supervisory authority and supervisors as defined in the Act and all other employees.

Case No. 10-RC-5807:

We find, in accord with the parties' stipulation and the Board's prior certification, that the following employees of the Employer at its Kingsport, Tennessee, plant, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

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[6] There was no dispute as to the scope of the appropriate unit. Although the Employer at the hearing initially opposed the inclusion of offset pressmen in the unit, it subsequently withdrew its opposition and stated that it took no position. In the event it should wish to oppose their inclusion, we shall permit the Employer to raise such issue by the challenge procedure. For reasons previously expressed, the issues as to the unit placement of the 4-color proof press operator, the plate repair men, and the supervisory status of B. J. Faulk, George Taylor, Hubert Horton, and Billy Cox, are deferred for resolution, if necessary, by way of challenges to their ballots. It may be noted that the 4-color proof press operator and the plate repair men are permitted to cast challenged ballots in two elections.

All bindery journeymen, apprentices and helpers performing production in folding, folded stock, machine and hand tipping, guarding, gathering, sewing, mechanical binding, oilers of bindery equipment, gluing off, cutting edge gilding, edge staining, round, backing and lining up, machine and hand casing in, bindery stock room storage, stock cutting, cover making (both hand and machine), super-finish, stamping and dye storage, indexing, repairing, examining and wrapping, bound stock storage, and shipping and receiving operations, but excluding all employees performing research, developmental and or experimental work, quality control, office and plant clerical employees, technical and professional employees, watchmen, guards, and supervisors as defined in the Act as amended, and all other employees.

5. The petitions herein were filed during the pendency of an economic strike involving the Petitioners and the Employer. The strike, as previously indicated, commenced March 11, 1963, and is still in progress. Under Section 9(c)(3) of the Act, as amended, "employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act *in any election conducted within twelve months after the commencement of the strike.*" [Emphasis supplied.] It may thus be seen that unless the elections sought herein are held before the expiration of the indicated 12-month period, those strikers who have been replaced will be rendered ineligible to vote. Therefore, in order to implement to the extent possible the Congressional intent to enfranchise replaced strikers during the first 12 months of an economic strike, we have decided to direct an election to be held no later than March 10, 1964, without awaiting any briefs which parties may file. We believe that this procedure, although a departure from that normally followed, is warranted by the circumstances and will effectuate the purposes and

policies of the Act. Further, as previously stated, we have not precluded consideration of any arguments, or changes of position, which the Employer, or any of the parties, may wish to advance with respect to the issues involved, for we have indicated that we shall treat a brief filed by a party as a motion for reconsideration of any issue disposed of adversely to that party. Finally, to insure that briefs will be considered before the results of any of the elections hereinafter directed are known, the Regional Director is hereby instructed to impound the ballots cast in all of the elections.

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among the employees in the units found appropriate no later than March 10, 1964. The Regional Director for the Tenth Region shall direct and supervise the elections, subject to the Board's Rules and Regulations. Eligible to vote are those in the units who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes in Case No. 10-RC-5804, by Local 175 Electrotypers Union, Inter-

national Stereotypers & Electrotypers Union of North America, AFL-CIO, or by no union; in Case No. 10-RC-5805, by Kingsport Printing Pressmen & Assistants' Union No. 336, International Printing Pressmen & Assistants' Union of North America, AFL-CIO, or by no union; in Case No. 10-RC-5806, by Progressive Lodge No. 1694, International Association of Machinists, AFL-CIO, or by Kingsport Printing Pressmen & Assistants' Union No. 336, International Printing Pressmen & Assistants' Union of North America, AFL-CIO, or by neither; and in Case No. 10-RC-5807, by Bindery Workers Union, Local No. 82, International Brotherhood of Bookbinders, AFL-CIO, or by Kingsport Printing Pressmen & Assistants' Union No. 336, International Printing Pressmen & Assistants' Union of North America, AFL-CIO, or by neither.

Dated, Washington, D. C., March 5, 1964.

FRANK W. MCCULLOCH, *Chairman*
BOYD LEEDOM, *Member*
JOHN H. FANNING, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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5. April 27, 1964 Supplemental Decision and Order of the Board

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

* * * * *

SUPPLEMENTAL DECISION AND ORDER

On March 5, 1964, the Board issued a Decision and Direction of Elections in these cases,[1] in which it directed elections to be held on March 10, 1964. For reasons stated

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[1] 146 NLRB No. 136.

therein, the Decison was based on the record made at the hearing before the hearing officer and was issued before the receipt of any briefs from the parties. However, the Board stated in its Decision that it would treat any briefs subsequently filed as motions for reconsideration of any adverse dispositions, directed that all ballots be impounded until the Board considered such briefs, and granted the Employer's request for a further extension of time for filing briefs. On March 6, 1964, the Employer filed a motion for reconsideration in which it requested the Board to set aside the Decision and Direction of Elections and postpone further action pending consideration of the briefs. By telegraphic order, dated March 9, 1964, the Board denied the motion for reconsideration to the extent that it requested a stay of the elections and reserved ruling as to the procedural and substantive issues raised. On the same day, the Employer filed a suit in the United States District Court for the District of Columbia, in which it requested a temporary restraining order enjoining the Board from conducting the election. The request was denied by the Court.[2] On March 10, 1964, the election was held as directed and all ballots cast were impounded. Thereafter, the Employer filed a brief and the Electrotypers and Pressmen filed a joint brief.

The Board has considered, in light of the record of the hearing herein, the Employer's motion for reconsideration and the briefs subsequently filed, which have been treated as motions for reconsideration of adverse findings made in

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[2] *Kingsport Press, Inc.* v. *Frank W. McCulloch, et al., Individually and as Chairman and Members of and constituting the National Labor Relations Board*, Civil Action No. 579-64. The matter is still pending argument on motions to enjoin the Board from opening and counting the impounded ballots and from certifying the results of the elections conducted March 10, 1964, in the event that the Board issues such orders.

the Decision and Direction of Elections, and concludes that they are lacking in merit.[3]

The Employer contends that the Board, by issuing its Decision and Direction of Elections in these proceedings and conducting the elections without awaiting briefs, acted improperly on the grounds *inter alia*: (1) that it violated its own Rules and Regulations; (2) that it lacked statutory authority for such procedure; and (3) that the 1959 amendment to Section 9(c)(3) provided no basis for the action.[4]

As to (1), although the Board's Rules and Regulations and Statements of Procedure permit the filing of briefs, they do not provide that the record, upon which the Board

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[3] Certain requests for clarification of unit descriptions, relating to composition not scope of the units, are hereby deferred for later disposition. As the Decision and Direction of Elections deferred certain contentions as to unit placement of disputed categories of employees, contentions in the briefs as to unit placement are also deferred for disposition by way of the challenge procedure.

[4] We do not regard our action in expediting the direction of elections herein so as not to disfranchise the strikers to be inconsistent with the position taken by the Board in *Miami Newspaper Printing Pressmen's Union Local 46* v. *McCulloch et al.*, 322 F. 2d 993 (C.A. D.C.). The absence of an absolute right by strikers to have an election within 12 months after the commencement of a strike does not mean that where an election is petitioned for and may practicably be held within the first 12 months of the strike, the Board should not, in processing the petition and scheduling the election, take into account Congress' manifest purpose in amending Section 9(c)(3), *i.e.* to give replaced economic strikers an opportunity to vote within that time limitation. Cf. *American Metal Products Co.*, 139 NLRB 601, 603-604.

We find no merit in the Employer's contention that employees lacked sufficient notice of the elections. We note that Notices of Elections were posted at the Employer's plant on Saturday, March 7, and the election was held on Tuesday, March 10. We are administratively advised that of the 1149 nonstrikers on the voting lists, 1108 or 95.5 percent cast ballots. Of the 1261 strikers on the voting lists, 1020 or 80.8 percent cast ballots.

directs an election, must include briefs.[5] Moreover, under the procedure here followed, the Board has considered the briefs and has afforded the parties full opportunity to present their positions as to all issues.[6]

In support of its second contention, the Employer argues that the Board has in effect directed prehearing elections, contrary to the provisions of Section 9(c)(1), as amended in 1947. However, as the original decision herein was based on the record made at a formal hearing in which all parties participated, the elections directed herein cannot be regarded as prehearing elections. As above indicated, the record need not include briefs, and the Employer's contention to the contrary is not supported by anything in Section 9(c)(1) or in the legislative history thereof.

In support of its third contention, the Employer argues, *inter alia*, that as Congress provided, in its 1959 amendment to Section 9(c)(3), that replaced economic strikers "shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act," the Board is required as a matter of law to promulgate formal regulations in the manner prescribed by the Administrative Procedure Act, contrary to its existing practice of resolving such eligibility issues through the adjudicative process. We find no merit in this argument. We believe—and our opinion is fortified by the legislative history of the amendment to Section 9(c)(3)—that Congress was concerned with preserving the right of replaced economic strikers to vote in elections for a period limited to one year from the commencement of the strike and left to the Board the implementation of its

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[5] Sections 102.67, especially 102.67(a) and (j), and 102.68; Sec. 101.21.

[6] We note also that at the hearing all parties extensively argued on the record their respective positions concerning the substantive issues involved.

intention.[7] Although Congress admittedly indicated that the implementation would be accomplished by regulation, we do not believe that Congress intended such regulation to be made only through formal rule making procedures. Accordingly, the Board, in its discretion, has decided to adhere to its policy of resolving such issues by the adjudicative process rather than by the issuance of formal rules and regulations.[8]

As to the substantive issues resolved in the Decision and Direction of Elections, the Employer contends that the Board erred in finding that questions concerning representation existed in all four cases despite its continued recognition of all Petitioners as the majority representatives of the units sought and the certification of two of the Petitioners, the Machinists and the Bindery Workers. To support these contentions, the Employer asserts: (a) the authority cited by the Board[9] for permitting an uncertified but recognized union to seek the benefits of certification has been discredited by the Board in arguments before the Supreme Court[10] that a certification merely identifies the majority representative which the Employer must

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[7] See the colloquy between Senator Kennedy and Senator Case on the floor of the Senate on April 23, 1959. S 5864, 86th Cong., 1st Sess., II Leg. Hist. LMR&DA p. 1138. Cf: *American Metal Products Co., supra*, footnote 4.

[8] See *W. Wilton Wood, Inc.*, 127 NLRB 1675; and *Pacific Tile and Porcelain Company*, 137 NLRB 1358. Our policy in this regard conforms with our normal approach. See, e.g., *The Ideal Electric & Mfg. Co.*, 134 NLRB 1275; *Goodyear Tire and Rubber Company*, 138 NLRB 453.

Contrary to the Employer, we have not deprived it of an opportunity to be heard on this issue. This is manifest from our treatment of the brief filed by the Employer as a motion for reconsideration and our impounding of the ballots cast in the elections.

[9] See *General Box Company*, 82 NLRB 678; and *Central Coat, Apron & Linen Service, Inc.*, 126 NLRB 958.

[10] See *McCulloch* v. *Sociedal Nacional*, 372 U.S. 10; and *Boire* v. *Greyhound Corp.*, U.S. , decided March 23, 1964.

recognize as such; and (b) the Pressmen should not have been treated as a cross petitioner in these two cases because it had no *bona fide* interest in representing the employees involved and its intervention was designed to prevent dismissal, under Board precedent, of the petitions filed by the certified and recognized representatives.

As to (a), we see no inconsistency between our position in *General Box* and that taken before the Supreme Court in the cases cited. The question of whether an incumbent representative is entitled to the benefits of a Board certification is a separate matter entirely from the manner in which Board certifications may be judicially reviewed.

As to (b), it is clear that the question whether the Pressmen had a representative showing, sufficient to constitute it as a cross-petitioner in Case Nos. 10-RC-5806 and 5807, was a matter for administrative determination and not litigable in these proceedings. In those two cases, the Board was administratively satisfied that the Pressmen had the showings of interest necessary to raise questions concerning representation.

The Employer contends, as to the unit found appropriate on the Electrotypers' petition, that the Board erred in not finding the only appropriate unit to encompass all employees in its Pre-Press Division. To support this contention, the Employer relies, as it did in its argument at the hearing, on the facts pertaining to operating changes which have been introduced, involving interchange of employees between the Molded Plate, Composing Room and Photo-Chemical departments, leading to a close integration among such departments. In our Decision we found such changes insufficient to destroy the separate identity and community of interests of the Molded Plate department employees and for this reason and in view of the bargaining history, we concluded that the requested unit was appropriate. As we adhere to this conclusion, the Employer's contention is without merit.

The Employer also urges for the first time that, at the least, the unit should include all employees in the Photo-Chemical department. However, without deciding whether a more comprehensive unit would also be appropriate[11] we note that our inclusion of only offset and dyeril plate making employees in the Plate Chemical Department, as requested by the Electrotypers, was based on the fact that they have been represented by the Electrotypers. As the Employer does not dispute this fact, we find no merit in the alternate contention.

ORDER

IT IS HEREBY ORDERED that the Employer's requests for reconsideration of the Board's Decision and Direction of Elections issued March 5, 1964, be, and they hereby are, denied.

DIRECTION

The Regional Director for the Tenth Region is hereby directed promptly to open and count the ballots cast in the election herein, but no earlier than 10 days from the date of the Supplemental Decision, and to take further steps pursuant to the Board's Rules and Regulations, as amended.

Dated, Washington, D. C., April 27, 1964.

FRANK W. MCCULLOCH, *Chairman*
BOYD LEEDOM, *Member*
JOHN H. FANNING, *Member*
GERALD A. BROWN, *Member*
HOWARD JENKINS, JR., *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[11] We could not, in any event, pass on such question because the International Typographical Union, which currently represents some of these employees, has an interest therein and has not intervened in this proceeding.

APPENDIX B

STATUTES INVOLVED

1. National Labor Relations Act (29 U.S.C. § 141 et seq.):

* * * * *

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, *in the manner prescribed by the Administrative Procedure Act*, such rules and regulations as may be necessary to carry out the provisions of this Act. (Italics added)

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *.

* * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9 (c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9 (c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9 (c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8 (b).

* * * * *

SEC. 9. (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish

to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall provide for an appropriate hearing* upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. *If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election* by secret ballot and shall certify the results thereof. (Italics added)

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement *shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act* in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election. (Italics added)

* * * * *

SEC. 9. (d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

SEC. 10. (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by sub-

stantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final; except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall

file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

2. Administrative Procedure Act (5 U.S.C. § 1001 et seq.):

SEC. 3. Publication of information, rules, opinions, orders and public records

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) Every agency shall separately state and *currently publish in the Federal Register* (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the *nature and requirements of all formal or informal procedures* available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) *substantive rules adopted as authorized by law and statements of general policy or interpretations* formulated and adopted by the agency for the guidance

of the public, but not rules addressed to and served upon named persons in accordance with law. *No person shall in any manner be required to resort to organization or procedure not so published.* (Italics added)

* * * * *

SEC. 4. Rule making

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—.

Notice; publication and contents

(a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after con-

sideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 of this Act shall apply in place of the provisions of this subsection.

Time of publication or service of rules

(c) The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

Petitions

(d) Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

* * * * *

SEC. 10. Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in

the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and *every final agency action for which there is no other adequate remedy* in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority. (Italics added)

Relief pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 of this Act or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

APPENDIX C

NATIONAL LABOR RELATIONS BOARD, RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE, SERIES 8, AS AMENDED

1. Rules and Regulations:

* * * * *

SEC. 102.67. *Proceedings before the regional director; further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to Board; proceedings before the Board; Board action.*—(a) The regional director may proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. *Any party desiring to submit a brief to the regional director, shall file the original and one copy thereof,* which may be a typed carbon copy, *within 7 days after the close of the hearing: Provided, however,* That prior to the close of the hearing and for good cause, *the hearing officer may grant an extension of time not to exceed an additional 14 days.* Requests for additional time in which to file a brief under authority of this section not addressed to the hearing officer during the hearing shall be made to the regional director, in writing, and copies thereof shall immediately be served on each of the other parties. Requests for extension of time shall be made not later than 3 days before the date such briefs are due in the regional office. No reply brief may be filed except upon special leave of the regional director. (Italics added)

(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be

final: *Provided, however*, That within 10 days after service thereof any party may file seven copies of a request for review with the Board in Washington, D. C. * * * *the regional director*, in the absence of a waiver, may issue a notice of election but *shall not conduct any election* or open and count any challenged ballots *until the Board has ruled* upon any request for review which may be filed. (Italics added)

* * * * *

(h) In any case *in which it appears* to the regional director *that the proceeding raises questions which should be decided by the Board*, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Board for decision. Such an order may be served on the parties upon the record of the hearing. (Italics added)

* * * * *

(j) Upon transfer of the case to the Board, the Board shall proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as it may determine, to decide the issues referred to it or to review the decision of the regional director, and shall direct a secret ballot of the employees, dismiss the petition, affirm or reverse the regional director's order in whole or in part, or make such other disposition of the matter as it deems appropriate.

SEC. 102.68. *Record; what constitutes; transmission to Board.—The record in the proceeding shall consist of:* the petition, notice of hearing with affidavit of service thereof, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the regional director, stipulations, exhibits, documentary evidence, affidavits of service, depositions, and *any briefs* or other documents submitted by the parties to the regional director or to the Board, and the decision of the regional director, if any. Immediately upon issuance by the regional

director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, the regional director shall transmit the record to the Board. (Italics added)

* * * * *

2. Statements of Procedure:

* * * * *

SEC. 101.21. *Procedure after hearing.*—

* * * * *

(b) Upon the close of the hearing, the entire record in the case is forwarded to the regional director or, upon issuance by the regional director of an order transferring the case, to the Board in Washington, D. C. The hearing officer also transmits an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the issues. *All parties may file briefs* with the regional director or, if the case is transferred to the Board at the close of the hearing, with the Board, within 7 days after the close of the hearing. If the case is transferred to the Board after the close of the hearing, *briefs may be filed with the Board within the time prescribed by the regional director.* The parties may also request to be heard orally. Because of the nature of the proceedings, however, permission to argue orally is rarely granted. *After review of the entire case,* the regional director or *the Board issues a decision,* either dismissing the petition or directing that an election be held. In the latter event, the election is conducted under the supervision of the regional director in the manner already described in section 101.19. (Italics added)

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Argument	7
Conclusion	13

CITATIONS

Cases:

Atlas Life Ins. Co. v. *Leedom*, 284 F. 2d 231 — 8

Boire v. *Greyhound Corp.*, 376 U.S. 473 — 7, 8, 9

Boire v. *Greyhound Corp.*, 309 F. 2d 397 — 7

Empresa Hondurena de Vapores, S.A. v. *McLeod*, 300 F. 2d 222 — 8

General Cable Corp. v. *Leedom*, 278 F. 2d 237 — 8

Inland Empire District Council v. *Millis*, 325 U.S. 697 — 10

Leedom v. *Kyne*, 358 U.S. 184 — 7, 8, 9

McCulloch v. *Sociedad Nacional*, 372 U.S. 10 — 8

Miami Newspaper Printing Pressmen's Union v. *McCulloch*, 322 F. 2d 993 — 8

National Mediation Board v. *Association for the Benefit of Non-Contract Employees*, No. 369, this Term, certiorari granted, Oct. 12, 1964 — 12

Optical Workers' Union Local 24859 v. *National Labor Relations Board*, 227 F. 2d 687, rehearing denied, 229 F. 2d 170, certiorari denied, 351 U.S. 963 — 11

Pacific Tile & Porcelain Co., 137 NLRB 1358 — 12

Securities and Exchange Commission v. *Chenery Corp.*, 332 U.S. 194 — 11

Switchmen's Union v. *National Mediation Board*, 320 U.S. 297 — 12

United Air Lines v. *National Labor Relations Board*, No. 139, this Term, certiorari granted, Oct. 12, 1964 — 12

748-566—64——1

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*): Page

Section 9(c) 3, 6
Section 9(c)(1) 10
Section 9(c)(3) 11, 12

Miscellaneous:

29 C.F.R.:

Section 101.20(c) 9
Section 102.67(h) 4
Section 102.67(j) 10
Section 102.68 11

Davis, *Administrative Law Treatise*, Sec. 8.14 10

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 504

KINGSPORT PRESS, INC., PETITIONER

v.

FRANK W. MCCULLOCH, ET AL.

and

LOCAL 175, ELECTROTYPERS UNION, INTERNATIONAL STEREOTYPERS AND ELECTROTYPERS UNION OF NORTH AMERICA, AFL–CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–2a) and the district's court order (Pet. 4a) are not yet reported. The Board's decision and direction of election (Pet. 5a–13a) and its supplemental decision and order (Pet. 13a–19a) are reported at 146 NLRB Nos. 136 and 137.

JURISDICTION

The judgment of the court of appeals (Pet. 3a) was entered on June 25, 1964. The petition for a writ of certiorari was filed on September 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal district court has jurisdiction to enjoin and set aside a representation election under the National Labor Relations Act at the suit of an employer alleging that the Board has exceeded its statutory authority, where the Board's action is not clearly erroneous and the statute provides another procedure for obtaining review of the employer's contentions in the courts of appeals.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 20a–26a to the petition.

STATEMENT

The undisputed facts, as set forth in the complaint, the exhibits attached thereto, and the exhibits attached to petitioner's motion to dismiss the complaint, may be summarized as follows:

Petitioner ("the Company") operates a book manufacturing plant in Kingsport, Tennessee. For several years prior to the events leading to this litigation, the Company had been a party to collective bar-

gaining agreements with various craft unions[1] covering approximately 1,600 of its production and maintenance employees. The agreements had the common expiration date of January 31, 1963. Despite repeated bargaining sessions, the Company and the unions were unable to reach agreement on new contracts, and the unions called a strike on March 11, 1963. The strike is still in progress, although the Company has continued the operations of its plant by using strike replacements, nonstrikers and some returned strikers. The majority of the original strikers, however, have not returned to work. (R. 2-4.)[2]

On January 27, 1964, four of the five striking unions filed petitions with the Regional Director for the Board's Tenth Region, pursuant to Section 9(c) of the National Labor Relations Act, requesting that representation elections be conducted in various units alleged by the unions to be appropriate for collective bargaining purposes. On February 10, 1964, the Regional Director, by order, consolidated the four cases and directed a hearing thereon, which was conducted on February 20, 21, 24, and 25, 1964. Various legal and factual issues were litigated at the hearing, including the Company's claims regarding the appro-

[1] Kingsport Printing Pressmen & Assistants' Union No. 336, International Printing Pressmen & Assistants' Union of North America, AFL–CIO; International Typographical Union, Local No. 940; Local 175, Electrotypers Union, International Stereotypers and Electrotypers Union, AFL–CIO; Bindery Workers Union, Local No. 82, International Brotherhood of Bookbinders, AFL–CIO; and Progressive Lodge No. 1694, International Association of Machinists, AFL–CIO.

[2] "R." refers to the mimeographed record prepared for the court of appeals and filed with the petition.

priateness of the unit sought by the Electrotypers Union, the unit placement of certain employees, the supervisory status of others, and whether two of the unions' petitions should have been dismissed because the unions already possessed Board certifications attesting to their representative status. (R. 4–5.)

When testimony and argument were concluded, the official reporter informed the Hearing Officer and the parties that, according to her estimate, the complete transcript would not be available until March 6, 1964. The Company requested that the date for filing briefs be extended to March 17, 1964, but the Hearing Officer directed that all briefs be filed by March 9, 1964. At the same time, he informed the parties that the four cases had been transferred to the Board for final decision.[3] On February 27, 1964, the Company moved the Board to extend the time for filing briefs from March 9 to March 17. (R. 5–6.)

On March 5, 1964, after considering the transcript of the hearing, the final portion of which had been delivered to it on March 3 (R. 32), the Board issued a Decision and Direction of Elections, granting the Company's motion to extend the time for filing of briefs until March 17, 1964, but directing that elections be held on the four petitions on March 10, 1964 (Pet. 5a–13a). The Board indicated that its decision was predicated on the facts established by the record, and the positions of the parties as set forth at the

[3] Under Section 102.67(h) of the Board's Rules and Regulations (29 C.F.R. 102.67(h)), the Regional Director is empowered to transfer election cases whenever "it appears to [him] that the proceeding raises questions which should be decided by the Board" (Pet. 32a).

hearing (Pet. 6a, n. 2). Explaining its variation from the normal practice of considering briefs prior to the direction of an election, the Board stated (Pet. 11a–12a):

> 5. The petitions herein were filed during the pendency of an economic strike involving the Petitioners and the Employer. The strike, as previously indicated, commenced March 11, 1963, and is still in progress. Under Section 9(c)(3) of the Act, as amended, "employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act *in any election conducted within twelve months after the commencement of the strike.*" [Emphasis supplied.] It may thus be seen that unless the elections sought herein are held before the expiration of the indicated twelve-month period, those strikers who have been replaced will be rendered ineligible to vote. Therefore, in order to implement to the extent possible the Congressional intent to enfranchise replaced strikers during the first twelve months of an economic strike, we have decided to direct an election to be held no later than March 10, 1964, without awaiting any briefs which parties may file. We believe that this procedure, although a departure from that normally followed, is warranted by the circumstances and will effectuate the purposes and policies of the Act. * * *

The Board added that it would consider the briefs of the parties, when filed, as motions for reconsideration. To insure that the briefs would be considered be-

fore the results of the election were known, it directed that the ballots cast in all the elections be impounded (Pet. 12a).

On March 9, 1964, the day before the scheduled election, the Company filed the instant suit in the District Court for the District of Columbia, seeking to enjoin the election on the grounds, *inter alia*, that the Board had violated the requirements of Section 9(c) of the Act and of its own rules (R. 2–14). A temporary restraining order was denied by the district court, and the election took place as scheduled. The Company then amended its complaint, to request that the Board and its agents be enjoined from counting the ballots and from taking any further action in the representation cases, and that the direction of elections be set aside (R. 54–55). The Board, in turn, filed a motion to dismiss the complaint, or, in the alternative, for summary judgment in its favor, on the grounds that the district court was without jurisdiction of the subject matter of the action, the action was premature, and the complaint failed to state a claim on which relief may be granted (R. 56).

On March 17, 1964, the Company filed a brief with the Board, which, pursuant to its decision of March 5, was treated as a motion for reconsideration of findings adverse to the Company (R. 132). On April 27, 1964, the Board, after consideration of the Company's contentions, found them to be without merit, and directed the Regional Director to open and count the ballots cast on March 10 (Pet. 13a–19a).

Shortly after issuance of this Supplemental Decision, argument was had in the district court on the

Board's motion to dismiss the complaint, and on May 7, the district court granted the motion "for the reason that the Court lacks jurisdiction over the subject matter of the action" (Pet. 4a).

The Company appealed. On May 15, 1964, the court of appeals, after hearing, denied the Company's motion for an injunction pending appeal, and ordered that the appeal be expedited (R. 142). On June 25, 1964, after further hearing, it entered its decision affirming the district court's dismissal of the complaint (Pet. 1a–2a).[4]

ARGUMENT

The decision of the court of appeals is correct. There is no conflict of decisions and no other occasion for review by this Court. Only last Term, in *Boire* v. *Greyhound Corp.*, 376 U.S. 473, this Court noted the congressional determination to provide for review of an election in the courts "only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election" (376 U.S. at 479).

1. The petition for certiorari relies chiefly upon an alleged conflict between the decision below and *Boire* v. *Greyhound Corp.*, 309 F. 2d 397 (C.A. 5), with respect to whether an employer may *ever* secure judicial review of an NLRB order in a representation proceeding by an independent action under 28 U.S.C. 1337, under the doctrine of *Leedom* v. *Kyne*, 358 U.S.

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[4] Thereafter, the ballots were tallied, but the Board's final decision is awaiting the disposition of the challenges and objections which have been filed.

184.[5] We submit that there is no conflict of decisions and that the abstract question sought to be raised is inappropriate for review for two independent reasons.

(a) The decision of the Fifth Circuit in *Boire* v. *Greyhound Corp.* lost all vitality after reversal by this Court. 376 U.S. 473. The fact that the Court held the particular order to be unreviewable in an independent action without passing upon the abstract question whether an employer may *ever* obtain review by that method lends emphasis to our contention that no such broad issue is presented or should be decided here.

(b) There is no reason to suppose that the court below based its decision upon the broad ground that *Leedom* v. *Kyne* is never available to an employer. The prior decisions mentioned by petitioner[6] were not cited. The summary *per curiam* disposition strongly suggests that the decision rested upon the circumstances of the particular case. Even if district court review at the suit of an employer is warranted in the event of plain error of a quasi-jurisdictional

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[5] *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, and similar cases involving foreign-flag ships (see *Empresa Hondurena de Vapores, S.A.* v. *McLeod*, 300 F. 2d 222 (C.A. 2)) are "not to be taken as an enlargement of the exception in *Kyne*." *McCulloch* v. *Sociedad Nacional*, 372 U.S. at 17. They authorize district court review only where this is necessitated by "the presence of public questions particularly high in the scale of our national interest because of their international complexion * * *." *Ibid.* This exception is plainly inapplicable here.

[6] See *General Cable Corp.* v. *Leedom*, 278 F. 2d 237 (C.A.D.C.); *Atlas Life Ins. Co.* v. *Leedom*, 284 F. 2d 231 (C.A.D.C.); *Miami Newspaper Printing Pressmen's Union* v. *McCulloch*, 322 F. 2d 993 (C.A.D.C.).

nature, such review would have been wholly inappropriate in this case where the legal issues involved are narrow, debatable, and in no real sense different from those involved in the ordinary representation proceeding as to which the statute plainly contemplates review in the court of appeals. This is apparent from scrutiny of the errors that petitioner sought to urge.

(i) Petitioner contends (Pet. 10–12) that the Board violated the requirement of Section 9(c)(1) that the Board "shall provide for an appropriate hearing" and shall make its determination "upon the record of such hearing." It is clear, however, that the Board did in fact base its decision upon the record of an appropriate hearing. Prior to direction of an election, a trial-type, pre-election hearing of the sort provided for by the Board's Rules and Regulations was held. The company was entitled to[7] and did present both its legal and factual arguments in opposition to the election petitions at this hearing (R. 5). The Board had those arguments before it and considered them in reaching its decision. The Company's present contention boils down to an argument that Congress made the filing of briefs essential to any "appropriate hearing," and also made such briefs a necessary part of

[7] Sec. 101.20(c) (29 C.F.R. 101.20(c)) of the Board's Statements of Procedures provides:

"* * * The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. *The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions* * * *." (Emphasis supplied.)

"the record of such hearing." However, oral argument is an entirely appropriate substitute for written briefs, and, indeed, the term "record" normally means the evidence adduced, the documents filed, and the arguments made at the hearing. See Davis, *Administrative Law Treatise*, Sec. 8.14. Neither the face of the statute nor the legislative history supports an argument that Congress intended to impose any more rigid requirements in Section 9(c)(1).[8]

For like reasons there was no violation of the congressional intention, embodied in Section 9(c)(1), to stop the practice of holding elections prior to hearing on the representation issues. Cf. *Inland Empire District Council* v. *Millis*, 325 U.S. 697. The fact that the Board did not wait until the parties had, through their briefs, expanded on the arguments they had already been given an opportunity to make at the hearing, is hardly a return to the practice prohibited in 1947.

(ii) Petitioner's further contention (Pet. 12, 13) that the Board at least violated its own Rules and Regulations, is also without substance. Section 102.67(j) of the Board's Rules and Regulations (29 C.F.R. 102.67(j); Pet. 32a) provides that, upon "transfer of the case to the Board, the Board shall proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing,

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[8] While we do not believe that briefs are a necessary part of an election hearing, it is not without significance that the Board did give the parties an opportunity to expand their arguments or to raise any new arguments in briefs to be filed after the election was held and prior to the time that the ballots were counted.

as it may determine * * *." Thus the Board has discretion to proceed "forthwith upon the record" without the submission of briefs. While Section 102.68 (29 C.F.R. 102.68, Pet. 32a–33a) states that the record shall consist, *inter alia*, of "any briefs or other documents submitted by the parties * * *," this provision obviously means only that, if briefs have been submitted, they shall constitute part of the record—not that the record is incomplete if no briefs are filed.

(iii) Finally, petitioner contends (Pet. 14–16) that the Board's Direction of Election violated Section 9 (c)(3) of the Act, which states that economic strikers "shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act." It argues that the Board permitted the strikers to vote without first promulgating, pursuant to the procedures of the Administrative Procedure Act, rules of general applicability delineating the voting rights of economic strikers. But it is settled principle that an administrative agency like the Board is free to utilize either adjudication or formal rule-making in formulating principles and implementing policy. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 201–203; *Optical Workers' Union Local 24859* v. *National Labor Relations Board*, 227 F. 2d 687 (C.A. 5), rehearing denied, 229 F. 2d 170, certiorari denied, 351 U.S. 963. Nothing in the legislative history of Section 9(c)(3) suggests an intention to confine the Board to formal rule-making procedures, and to preclude it from using its customary case-by-case method of adjudication, in implementing the requirements of that provision.

Nor would such a limitation effectuate the purposes of Section 9(c)(3). For the problem presented by that section is to apply a recognized principle—that a striker may retain a sufficient interest in his former job to be entitled to have a voice in selecting a representative (see *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1359–1360)—to a wide variety of factual situations. Such problems are best handled case-by-case as they arise, instead of issuing at the outset a broad general regulation which cannot adequately take into account all the variations which may develop.

2. The question in the instant case is not similar to *United Air Lines* v. *National Mediation Board*, No. 139, this Term, and *National Mediation Board* v. *Association for the Benefit of Non-Contract Employees*, No. 369, this Term, certiorari granted, October 12, 1964 (Pet. 22–23) for two reasons. *First*, under the Railway Labor Act, unlike the National Labor Relations Act, there is no statutory procedure whereby an employer can obtain review in the court of appeals of its contentions respecting the invalidity of a representation election. Cf. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297. Therefore, if the district court lacks jurisdiction to review a representation determination by the National Mediation Board, the Mediation Board's action is wholly unreviewable; whereas there is a statutory procedure for obtaining post-election review of the rulings of the National Labor Relations Board. *Second*, the issues in those cases—whether an employer is entitled to be heard at all in a representation proceeding and whether the NO UNION choice must appear on the ballot—are

broader, more fundamental, and more nearly questions of the agency's statutory power than the specialized procedural details that petitioner has sought to raise.

CONCLUSION

The courts below properly refused to grant district court review of the Board's election order, because the present case quite plainly does not involve any extraordinary circumstances such as would warrant a departure from the congressional policies embodied in the statutory plan of judicial review. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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